

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 DOUGLAS VERDIER and ANDREW
7 LONG,

8 Plaintiffs,

9 v.

10 GREG BOST and LAURIE BOST,

11 Defendants.

CASE NO. C18-5043 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS, GRANTING
PLAINTIFFS LEAVE TO AMEND,
AND GRANTING PLAINTIFFS'
MOTIONS TO EXTEND EXPERT
WITNESS DISCLOSURE
DEADLINE

12 This matter comes before the Court on Defendants Greg and Laurie Bost's
13 ("Defendants") motion to dismiss (Dkt. 16). The Court has considered the pleadings filed
14 in support of and in opposition to the motion and the remainder of the file and hereby
15 grants in part and denies in part the motion for the reasons stated herein.

16 **I. PROCEDURAL HISTORY**

17 On January 19, 2018, Plaintiffs Douglas Verdier and Andrew Long filed a
18 complaint against Defendants.¹ Dkt. 1. On July 9, 2018, Defendants filed a motion to
19

20
21 ¹ Defendants ask the Court to dismiss the lawsuit because of Plaintiff Long's
22 unauthorized practice of law. The Court declines, noting that Plaintiffs appear separately in the
complaint as citizens petitioning *pro se*. Dkt 1, 1:13–16. Additionally, each Plaintiff has signed
each pleading. Dkt. 1, 11:17–25; Dkt. 19, 10.

1 dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Dkt. 16. On July 25, 2018, Plaintiffs jointly
2 responded. Dkt. 19. On July 31, 2018, Defendants replied. Dkt. 20.

3 On July 5, 2018, Plaintiffs filed a motion to extend the time to disclose an
4 additional expert witness. Dkt. 17. On August 15, 2018, Plaintiffs filed a separate motion
5 to extend the expert witness disclosure deadline. Dkt. 21.

6 **II. FACTUAL BACKGROUND**

7 This case arises out of Plaintiffs' allegations that Defendants improperly
8 introduced dirt, fill, and a concrete retaining wall or fence into the Washougal River
9 between 2009 and 2013, in violation of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*
10 ("CWA"). Dkt. 1. Plaintiff Verdier and the Defendants are neighbors and own adjoining
11 homes along the Washougal River in Washougal, Washington. Dkt. 1, ¶ 6. Plaintiff Long
12 recreates in the Washougal River. Dkt. 1, ¶ 5. It is undisputed that the Washougal River is
13 a waterway of the United States. Dkt. 1, ¶¶ 8–11; 33 C.F.R. § 328.3(a)(1).

14 Plaintiffs bring two CWA claims and a state law nuisance claim under RCW
15 7.48.140(3). In their first CWA claim, titled "Fill Without Permit," Plaintiffs allege that
16 Defendants dumped soil directly into the Washougal River for a period of at least thirty
17 days beginning in January 2013. Dkt. 1, ¶¶ 20–23. Plaintiffs allege that Defendants'
18 discharge of soil was a pollutant within the meaning of the CWA. *Id.*

19 In their second CWA claim, also titled "Fill without Permit," Plaintiffs allege that
20 Defendants dumped "fill material," to include concrete and other construction debris, into
21 the Washougal, beginning on January 20, 2013, in order to construct or maintain a
22 retaining wall. Dkt. 1, ¶¶ 24–30. Plaintiffs allege that Defendants' discharge of fill

1 material was a pollutant within the meaning of the CWA. *Id.* Plaintiffs also allege that
2 the retaining wall presents an ongoing discharge of pollutants into the Washougal River
3 through crumbling or disintegration. *Id.* at ¶ 29. Plaintiffs allege that Defendants acted
4 without any applicable permit at all times.

5 Plaintiffs' public nuisance claim is based upon Washington law prohibiting the
6 introduction of structures into public rivers. *See* RCW § 7.48.140(3); Shoreline
7 Management Act of 1971, RCW § 90.58.010, *et seq.* Plaintiffs allege that the retaining
8 wall remains permanently below the Washougal River's ordinary high-water mark. Dkt.
9 1, ¶ 34.

10 III. DISCUSSION

11 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure
12 may be based on either the lack of a cognizable legal theory or the absence of sufficient
13 facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696,
14 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is
15 construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir.
16 1983). To survive a motion to dismiss, the complaint must provide the grounds for
17 entitlement to relief and not merely a "formulaic recitation" of the elements of a cause of
18 action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff must plead
19 sufficient facts to state a facially plausible claim to relief to prevail on a motion to
20 dismiss. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir.
21 2010).

1 **A. Citizen Suits Under the CWA**

2 The CWA establishes a comprehensive scheme to regulate the discharge of
3 pollutants into the navigable waters of the United States. 33 U.S.C. § 1251(a); *Resource*
4 *Inv. Inc. v. U.S. Army Corps of Eng’rs*, 151 F.3d 1162, 1165 (9th Cir. 1998). CWA
5 § 1311 references two permit types: the first issued by the Environmental Protection
6 Agency (“EPA”) under the National Pollution Discharge Elimination System
7 (“NPDES”), 33 U.S.C. § 1342 (commonly known as “§ 402”), and the second issued by
8 the Army Corps of Engineers (“Corps”) under 33 U.S.C. § 1344 (commonly known as
9 “§ 404”). 33 U.S.C. §§ 1342, 1344.

10 In general, actions can be brought by private persons and entities for the purpose
11 of enforcing pollution discharges under CWA § 1311(a). *See* 33 U.S.C. § 1365(a). This is
12 typically referred to as the CWA’s “citizen suit” provision. *Id.* Here, Plaintiffs bring
13 citizen suit claims alleging that Defendants violated § 1311(a) of the CWA by
14 discharging pollutants, specifically dirt, fill, and structures, without a permit, into the
15 Washougal River. Defendants argue that the CWA only authorizes citizen suits to enforce
16 violations of permits issued by the EPA for the discharge of pollutants, which are
17 regulated separately than permits issued by the Corps for dredge or fill, the materials at
18 issue here. Dkt. 16, at 2 ¶ B. Because Plaintiffs make factual allegations that plausibly
19 show CWA § 1311(a) violations, Defendants have failed to meet their burden on a
20 motion to dismiss.

21 It is unlawful to discharge any pollutant into the waters of the United States except
22 discharges made in compliance with the CWA. 33 U.S.C. §§ 1311(a), 1342(a). In order to

1 lawfully discharge a pollutant, a permit must be obtained. *See Community Ass'n for*
2 *Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 946 (9th Cir.
3 2002). As Plaintiffs' argument goes, because Defendants failed to obtain a permit to
4 discharge soil and fill into the Washougal River, their discharge was not in compliance
5 with CWA § 1311(a). To the extent that Defendants have failed to cite any authority to
6 the contrary, the Court concludes that this is a cognizable legal theory, as explained
7 below.

8 The CWA's citizen suit provision, 33 U.S.C. § 1365(a)(1), authorizes a private
9 cause of action against any person who is alleged "to be in violation of an effluent
10 standard or limitation." Section 505(f) goes on to define effluent standard or limitation as:

- 11 (1) an unlawful act under subsection (a) of § 1311;
- 12 (2) an effluent limitation or other limitation under § 1311 or 1312;
- 13 (3) a standard of performance under § 1316;
- 14 (4) a prohibition, effluent standard or pretreatment standard under § 1317;
- 15 (5) certification under § 1341;
- 16 (6) a permit or condition thereof issued under § 1342; or
- 17 (7) a regulation under section 1345(d).

18 33 U.S.C. § 1365(f). Thus, for Plaintiffs to claim a violation of § 1365(a)(1), they must
19 plausibly show that Defendants violated an effluent standard or limitation as described by
20 at least one of the seven subsections in the citizen suit provision. *Citizens Alliance for*
21 *Property Rights v. City of Duvall*, No. C12-1093RAJ, 2014 WL 1379575 at *2 (W. D.
22 Wash. Apr. 8, 2014). Subsections (f)(1) (an unlawful act) and (f)(6) (a permit or
condition thereof) are most relevant here.

Defendants make a statutory interpretation argument that Congress’s explicit inclusion of § 402 violations in subsection (f)(6), as well as its silence regarding § 404 violations, demonstrates Congress’ intent to provide a vehicle for citizens to contest discharges of pollutants with or without a § 402 permit, but never to contest violations of dredge or fill material under permits that would be regulated by the Corps under § 404. However, it is Defendants’ failure to obtain any permits at all, issued either by the EPA or the Corps, that turns their discharge into the unlawful act that Plaintiffs contemplate under § 1365(f)(1). If Defendants had obtained a permit for their activities, their discharges would most likely have been be “in compliance” with the CWA and therefore not unlawful. 33 U.S.C. § 1311(a). Moreover, if Defendants had specifically obtained a § 404 permit issued by the Corps, the Court agrees that a violation of that permit would likely not be redressable by citizen plaintiffs. *See, e.g., Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356 (5th Cir. 2012). But Defendants have not provided the Court any direct authority for the proposition that citizens cannot bring suit against unpermitted discharges under the CWA. Accordingly, Defendants’ motion to dismiss is denied on that basis.

B. “Wholly Past” Violations

Plaintiffs’ first CWA claim is based on Defendants’ introduction of soil into the Washougal River for a discrete period in January 2013. The CWA does not permit suits for violations “wholly past,” instead requiring plaintiffs to show that a defendant is “in violation” of the CWA at the time the lawsuit is filed. *See Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (finding that Congress’ pervasive

1 use of the present tense in § 505 demonstrates that the interest of the citizen-plaintiff is
2 forward looking).

3 In their first claim, Plaintiffs have not met the exacting temporal standard required
4 by *Gwaltney*. In ¶¶ 20–23 of their complaint, Plaintiffs fail to create a nexus between
5 Defendants’ thirty-day introduction of soil in 2013 and an ongoing CWA violation today.
6 Dkt. 1. While ¶ 21 does allege changes to the Washougal’s riverbed, the language used is
7 entirely in the past tense.² Accordingly, the Court concludes that the violation, as alleged,
8 is wholly past, and Plaintiffs’ first CWA claim is dismissed.

9 Plaintiffs adequately pled their second CWA claim under the *Gwaltney* standard.
10 This is because they allege a continuing violation of the CWA. *See* Dkt. 1, ¶ 29 (“creates
11 an ongoing discharge of pollutants from January 2013 to present through the changes,
12 crumbling, or other movement of added material”). While the Court notes that Plaintiffs’
13 allegations are imprecise, they are construed in their favor. *See Keniston*, 717 F.2d at
14 1301. Here, Plaintiffs plausibly show that the ongoing discharge of concrete and other
15 retaining-wall material into the Washougal River without a permit is a present and
16 unlawful discharge of pollutants under the CWA.

17 **C. Public Nuisance Claim**

18 Last, Plaintiffs maintain a Washington law claim for public nuisance under RCW
19 7.48.140(3), based on Defendants’ erection of a structure below the high-water mark of
20 the Washougal River, a public waterway. Under Washington law, a private person may

21 ² Plaintiffs list numbered paragraph 21 twice in their complaint. The Court refers to the
22 second paragraph 21.

1 maintain an action for public nuisance only upon a showing of special injury distinct
2 from that done to the whole community. *State v. Grant*, 156 Wn. 96 (1930). However, the
3 Washington Supreme Court recently examined the special injury requirement precisely as
4 it relates to a public nuisance action seeking the removal of an impediment from a
5 waterway. *See Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 271
6 (2018). In upholding the plaintiff's organizational standing, the court reasoned that the
7 conservancy members had injuries distinct from the public because they regularly
8 recreated in the waters of Lake Chelan. *Id.* at 272. Moreover, the court found that the
9 injury to the plaintiff's members was real and not speculative, because the members had
10 been blocked from the lake's waters by the defendant's six-acre landfill protruding into
11 the lake. *Id.* at 273. In reaching its determination, the court reviewed and rejected *Lampa*
12 *v. Graham*, 179 Wn. 184 (1934), which is relied upon by Defendants.

13 Here, Plaintiffs allege with specificity that they were blocked from recreating
14 (wading) in the public waters of the Washougal River. Dkt. 1, ¶ 35. Under Washington
15 law apparent, Plaintiffs meet standing requirements. Accordingly, the Court denies
16 Defendants' motion to dismiss with respect to the public nuisance claim.

17 **D. Appropriate Relief**

18 If the court finds dismissal is warranted, the court should grant leave to amend
19 unless amendment would be futile. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
20 1048, 1052 (9th Cir. 2003). As Plaintiffs may plead facts that would render the first CWA
21 violation ongoing, the Court cannot conclude that any amendment would be futile.
22 Plaintiffs are therefore granted leave to amend the first claim.

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Defendants' motion (Dkt. 16) is
3 **GRANTED in part** and **DENIED in part**. Plaintiffs are granted leave to amend the
4 complaint by October 12, 2018. Plaintiffs' other motions to extend the expert witness
5 disclosure deadline (Dkt. 17, 21) are **GRANTED**.

6 Dated this 11th day of September, 2018.

7 

8 BENJAMIN H. SETTLE
9 United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22